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No. 304

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FILED
JUL 13 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR CERTAIN AIR CARRIERS AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C

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Amici are trunkline air carriers permanently certificated by the Civil Aeronautics Board to transport persons, property and mail by air. They are "combination carriers" within the meaning of the Board's blocked space policy statement.* (R. 144, J.A. 80.) By virtue of that policy statement and the Board's implementation of it, as illustrated in the present case, these carriers are or may be prohibited from filing tariffs providing for blocked space service.

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* Regulation No. PS-24, 14 C.F.R. § 399.37.

Simply stated, "blocked space service" means the transportation of property in all-cargo aircraft at wholesale rates applicable only when the shipper reserves a specified amount of space on a regularly recurring basis for a given period of time. (R. 144, J.A. 80.) Under the Board's policy statement only all-cargo carriers, holders of certificates that authorize the transportation only of property or of property and mail, may provide blocked space service.

The *amici* have made very substantial investments, both in aircraft and ground facilities, in the air freight business. They are threatened with grave injury by the Board's adoption and implementation of its blocked space policy. If an all-cargo carrier sees fit to file blocked space tariffs applicable on a route served by any of them, the affected combination carrier will be powerless to match the lower rates of its competitor and may well see its bulk freight business slip away. One of the *amici* has attempted to file a tariff to match an all-cargo competitor's blocked space tariff and has seen it rejected, like petitioners' tariffs, on the basis of the Board's policy statement.

All of the *amici* participated in the rulemaking proceeding as a result of which the Board adopted its policy statement on blocked space service. They were given no notice by the Board in that proceeding that it was contemplating making blocked space service the exclusive preserve of the all-cargo carriers. Three of the *amici** also appeared as *amici curiae* in the court below and filed a brief in support of petitioners. The carriers participating as *amici* there emphasized that the Board never gave them notice that it contemplated establishing a blocked space monopoly in the all-cargo carriers.

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* Delta Air Lines, Inc., Braniff Airways, Inc., and Continental Air Lines, Inc.

ARGUMENT

1. The decision of the court below upholding the Board's implementation of its blocked space policy statement through the rejection of petitioners' blocked space tariffs is in flat conflict with prior decisions of this Court. By the Board's own statement in its order of rejection, petitioners' tariffs were rejected because petitioners were "without authority to provide blocked space service." (R. 159, J. A. 95.) Yet the Board acknowledged by its previous acceptance and suspension of those tariffs that petitioners were authorized under the terms of their certificates to offer blocked space service. (R. 122-28, 129-31, 156-58, J.A. 58-64, 65-67, 92-94.) Thus only the policy statement itself made the word "property" in petitioners' certificates mean something different from the same word in the certificate of The Slick Corporation, whose blocked space tariff was accepted by the Board.

This modification of petitioners' certificates without the mandatory notice and hearing required by sections 401(f) and (g) of the Federal Aviation Act, 49 U.S.C. §§ 1371(f), (g), can be sustained only by disregarding this Court's decisions in *CAB* v. *Delta Air Lines*, 367 U.S. 316 (1961); *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947); and *FCC* v. *National Broadcasting Co.* (KOA), 319 U.S. 239 (1943).

Amici have suffered the same modification of their certificates as have petitioners. One of them indeed has had a tariff filing rejected for lack of authority to provide blocked space service.

Of primary concern to *amici* is the failure of the Board and the court below to pay any heed to the security of their certificates, which this Court so emphasized in the *Delta* case. The large and growing investment of these carriers in aircraft and ground facilities and all that goes with operating trunk airlines is based upon the

certificates they hold naming their routes and specifying the services they may render. The integrity of this investment is directly related to the security of those certificates. If through rulemaking the Board is permitted to cut away portions of *amici's* authority under their certificates, there will no longer be the kind of security of license rights in airline routes that Congress, as the Court held in the *Delta* case, meant that there should be. Under the guise of classification, *amici* might be told tomorrow that they could no longer serve cities less than 500 miles apart—that such short-haul service had been reserved for a different class of carriers. That *amici* had made large investments in short-haul operations would be of no avail. The Board would be able to do indirectly what under the *Delta* case it cannot do directly without the notice and evidentiary hearing required by Section 401(g) of the Act. Compare Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity*, 15 J. Air L. & Com. 377, 384 (1948).

2. Like the petitioners, one of the *amici* (Continental Air Lines) has suffered summary rejection of a blocked space tariff, filed to match an all-cargo carrier competitor's tariff, CAB Order No. E-23127, Jan. 18, 1966, and the other *amici* face the same prospect. The Board's action—taken without an evidentiary hearing—thus prohibited that amicus from meeting the reduced rates of its competitor. Such action is in the teeth of principles laid down or approved by this Court. See *Texas & Pac. Ry.* v. *United States*, 289 U.S. 627, 636 (1933); *New York Central R.R.* v. *United States*, 99 F. Supp. 394, 398 (D. Mass. 1951), *aff'd per curiam*, 342 U.S. 890 (1951); *cf. ICC* v. *New York, N.H. & H. R.R.*, 372 U.S. 744 (1963).

3. The way in which the blocked space policy statement was promulgated presents a question that should be decided by this Court concerning the procedures agencies should follow in making rules that affect vital in-

terests. The Board failed to comply with the fundamental requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. § 1003, as to notice and the opportunity for written comment. *Amici* recognize that, had the Board's blocked space "policy statement" been what it purported to be, it would have been exempt from the requirements of Section 4 of the Administrative Procedure Act as a "general statement of policy." However, the Board transformed its so-called "policy statement" into a substantive rule when it rejected petitioners' blocked space tariffs solely on the basis of the policy statement. (R. 159, J.A. 95.) The "policy statement" then, if still an appropriate subject for rule-making at all, clearly could not be validly promulgated without strict compliance with Section 4.

The Board argued in the court below that the combination carriers had actual notice that the Board was considering reserving the privilege of providing blocked space service exclusively for the all-cargo carriers. As a matter of fact, the Board never gave any such notice, actual or otherwise. As noted heretofore, three of the present *amici* informed the court below in their brief of the fact that the Board never gave notice that it contemplated making blocked space service a monopoly of the all-cargo carriers. The *amici* as well as the petitioners deserve to be heard on that question.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the petition for certiorari herein be granted. This case presents important questions of administrative law, as well as important questions in the administration of the Federal Aviation Act, affecting the vital economic interests of a very large segment of the airline industry.

Respectfully submitted,

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